Ohio Wesleyan University, Oxford University, Parsons, Pennsylvania College, University of Rochester, Rutgers, Santa Clara, University of Tennessee, Tulane University, Ursinus, University of Utah, Washburn, Washington and Lee University, West Virginia University, Western Reserve University, University of Wisconsin, Wittenberg, Wofford, 1.

LIABILITY OF FUTURE INTERESTS IN PERSONALTY FOR OWNER'S DEBTS. — Although the ancient common law did not recognize the existence of future estates in personalty, the law became more liberal at an early period, and there has resulted an approximate assimilation of the rules governing the limitation of future interests in realty and personalty.[1] Remainders, vested[2] and contingent,[3] legal[4] and equitable,[5] may without question be carved out of the absolute ownership of chattels. However, the power to deal with these interests when once created, has, in most jurisdictions, been confined to narrower limits. This is manifested most frequently in the restrictions placed on two closely allied incidents of ownership, alienability and liability to the demands of creditors.

In these two particulars, the law as to personalty and realty has followed much the same trend. The assignment of a vested remainder in either land or chattels was allowed at common law; the estate passed by deed as a present property right.[6] But contingent remainders in land could be assigned only in equity or by estoppel,[7] as they were not regarded as present interests,[8] and, moreover, such an assignment was repugnant to the law of champerty and maintenance.[9] Though the doctrines of champerty and maintenance never applied to personal property, the rule was the same.[10] In several jurisdictions, this doctrine has been modified by statute and decision, so that a contingent interest may be assigned at law.[11]

Although alienability and liability to the claims of creditors are two very similar attributes of property and other rights, they have often been disassociated in dealing with future estates. It is everywhere settled that a vested remainder in land may be sold on execution at law, title passing by sheriff's deed.[12] But a vested remainder in chattels is not subject to sale by common-law execution, as the writ of *fieri facias*

[1] See 2 BL. COMM. 398; 2 KENT COMM. 352. *Cf.* N. Y. CONSOL. LAWS, 1909, c. 41, § 11; N. Y. LAWS OF 1909, c. 45.

[2] Hyde *v.* Parrat, 1 P. Wms. 1; Langworthy *v.* Chadwick, 13 Conn. 42.

[3] Logan *v.* Executor of Ladson, 1 Desaus. (S. C.) 271.

[4] Dargan & Bradford *v.* Richardson, Dud. (Ga.) 62.

[5] Patterson *v.* Devlin, McMul. Eq. (S. C.) 459.

[6] Dargan & Bradford *v.* Richardson, *supra.*

[7] Den d. Hopper *v.* Demarest, 21 N. J. L. 525; Watson *v.* Smith, 110 N. C. 6, 14 S. E. 640. See 4 KENT COMM. 260.

[8] See WILLIAMS, REAL PROPERTY, 21 ed., 369.

[9] See BUTLER AND HARGRAVE, NOTES ON CO. LITT., 265 *a*, note 212.

[10] Ridgeway *v.* Underwood, 67 Ill. 419. It does not appear that a contingent remainder in chattels ever passed by estoppel.

[11] Lawrence *v.* Bayard, 7 Paige (N. Y.) 70; Ham *v.* Van Orden, 84 N. Y. 257. 1 REV. STAT. OF 1836, 725, § 35 was in force when these cases were decided. Putnam *v.* Story, 132 Mass. 205.

[12] Atkins *v.* Bean, 14 Mass. 404; Deadman *v.* Yantis, 230 Ill. 243, 82 N. E. 592; Sheridan *v.* House, 4 Keyes (N. Y.) 569.

requires an actual custody and delivery of the goods, and it can be reached only by a creditor's bill in chancery.[13] In both realty and personalty contingent interests are beyond the reach of creditors in most jurisdictions. A contingent remainder in land, not being assignable, may not be sold on execution at law [14] and *a fortiori* the same is true of a contingent remainder in chattels. The right to realize on them by a creditors' bill in equity seems to depend upon whether they may be accorded the dignity of an existent estate. In most jurisdictions this is denied.[15] Assignments of contingent remainders in equity are sustained as specific performance of contracts to assign after the estate vests, and it is said that a court of equity cannot compel a debtor to make such a contract.[16] However, in a few jurisdictions the courts have been willing to raise contingent estates above the rank of mere possibilities,[17] and in others the same result has been produced by statute, so that a contingent interest in lands or chattels may be reached by a creditors' bill.[18] The question was raised for the first time in New York by a recent case which decided [19] that an equitable contingent remainder is "property" within section 1871 of the Code of Civil Procedure. *National Park Bank* v. *Billings*, 144 N. Y. App. Div. 536, 129 N. Y. Supp. 846. The court appears to have been influenced by section 59 of the Real Property Law,[20] which declares that all interests in land or chattels shall be alienable like estates in possession. However, it is possible that the same result might have been reached independently of the statute. It requires no straining of logic to say that a contingent remainder dependent only on surviving the life tenant and attaining a certain age, is more than a mere possibility. Such estates were always transmissible,[21] and the fact that the interest is equitable rather than legal offers no ground for a valid distinction.[22] Under the New York statute defining contingent remainders,[23] estates that in other jurisdictions would be treated as contingent are called vested, and accorded, without question, the dignity and attributes of a present property.[24] It is difficult to see why an estate limited with an added contingency sufficient to withdraw it from the terminology of this statute should be so different in its essence, as to be beyond the reach

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[13] Dargan & Bradford *v.* Richardson, *supra*; Allen *v.* Scurry, 1 Yerg. (Tenn.) 36; Lockwood & Co. *v.* Nye, 2 Swan (Tenn.) 515.

[14] Haward *v.* Peavey, 128 Ill. 430, 21 N. E. 503; Roundtree *v.* Roundtree, 26 S. C. 450, 2 S. E. 474.

[15] Howbert *v.* Cauthorn, 100 Va. 649, 42 S. E. 683; Watson *v.* Dodd, 68 N. C. 528.

[16] Watson *v.* Dodd, *supra*.

[17] Jacob, Jr. *v.* Howard, 15 Ky. L. Rep. 133, 22 S. W. 332.

[18] MASS. REV. LAWS, c. 159, § 3, cl. 7, provides for a "suit by creditors to reach and apply in payment of a debt, any property, right, title or interest, legal or equitable, of a debtor, which cannot be reached at law, if the value can be ascertained by sale, appraisal or by any means within the ordinary procedure of the court." Alexander *v.* McPeck, 189 Mass. 34, 75 N. E. 88. The Missouri statute provides for execution sale of any interest in real estate. MO. GEN. STAT. OF 1865, 642, § 18; White *v.* McPheeters, 75 Mo. 286.

[19] Scott and McLaughlin, JJ., dissented with opinions.

[20] N. Y. CONSOL. LAWS, 1909, c. 50; N. Y. LAWS OF 1909, c. 52. *Cf.* Cohalan *v.* Parker, 138 N. Y. App. Div. 849, 123 N. Y. Supp. 343.

[21] Pinbury *v.* Elkins, 1 P. Wms. 563; Crawford *v.* Clark, 110 Ga. 729, 36 S. E. 404.

[22] Ricketson *v.* Merrill, 148 Mass. 76, 19 N. E. 11.

[23] N. Y. REAL PROPERTY LAW [CONSOL. LAWS, 1909, c. 50; LAWS OF 1909, c. 52], § 40.

[24] Bergmann *v.* Lord, 194 N. Y. 70, 86 N. E. 828.

of a court of equity. On the other hand, it is conceivable that a court of equity might, in its discretion, deny this relief, as the sacrifice involved in the sale of a contingent interest may be unconscionable.[25]

VALUATION OF WATER RIGHT AND FRANCHISE AS BASIS FOR DETERMINING IRRIGATION RATES. — The law is now settled by decision,[1] or by statute,[2] that a company engaged in distributing water for irrigation is in the public service. Not only must it supply all who apply properly,[3] but the rates must be reasonable and are subject to public regulation.[4] The basis generally approved for determining the rates is a fair return on the present value of the property used in the business.[5] A recent case decides that water rights are rights of the consumer attached to his land and not property upon which the irrigation company is entitled to an income, but that the company's franchise is to be valued as a basis for returns. *San Joaquin & Kings River Canal & Irrigation Co.* v. *County of Stanislaus*, Circ. Ct., N. D. Cal. The case involves the western doctrine of prior appropriation, under which the first taker of water obtains a vested right in it.[6] Appropriation by an irrigation company not owning land has led to conflicting theories regarding the basis of the right. The weight of authority is that the user is the appropriator, and the company, though in the public service, is the agent of the landowner.[7] Such reasoning is unsatisfactory. The requisites for appropriation being diversion, and application to a beneficial use within a reasonable time,[8] it would seem that the company which diverts the water and applies it to lands other than its own meets the requirements. The company may change the point of diversion, the place of use, and may sell the right apart from the land.[9] The water right is a property right,[10] but the fiction that it belongs to the consumer need not be resorted to in order to reach the conclusion of the court in the principal case. Whatever theory be taken, the right is not one upon which a return would be justified. Undoubtedly it depends upon the consumer for its continuance;[11] so to charge for it is to charge for doing what the consumer allows; it is to require payment for the very right on which

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[25] In Jacob, Jr. *v.* Howard, *supra*, the decree was, that only a small portion of the estate be sold, as a sacrifice was to be avoided, if possible. The Massachusetts court has allowed equitable execution on a remainder subject to a single contingency, but refused to do so as to an interest subject to a double contingency. Clarke *v.* Fay, 205 Mass. 228, 91 N. E. 328. In Howbert *v.* Cauthorn, *supra*, the court said, "It would be a speculative transaction, and ruinous in its consequences, not only to creditors, but to all parties interested."

[1] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 17 Sup. Ct. 56.
[2] See, for example, CAL. STAT., 1885, 95.
[3] San Diego Land & Town Co. *v.* Sharp, 97 Fed. 394.
[4] Salt River Valley Canal Co. *v.* Nelssen, 10 Ariz. 9, 85 Pac. 117.
[5] San Diego Land & Town Co. *v.* National City, 174 U. S. 739, 19 Sup. Ct. 804.
[6] Atchison *v.* Peterson, 20 Wall. (U. S.) 507.
[7] Gould *v.* Maricopa Canal Co., 8 Ariz. 429, 76 Pac. 598.
[8] See Combs *v.* Agricultural Ditch Co., 17 Colo. 146, 28 Pac. 966, 967.
[9] Strickler *v.* City of Colorado Springs, 16 Colo. 61, 26 Pac. 313.
[10] See Cash *v.* Thornton, 3 Colo. App. 475, 34 Pac. 268, 269.
[11] New Merger Ditch Co. *v.* Armstrong, 21 Colo. 357, 40 Pac. 989.